92-1544

Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,
Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court may appropriately exercise "inherent power" to impose sanctions arising from an attorney's litigating behavior, not on the attorney individually, but upon a non-party (in this case a non-profit, public-interest foundation) that is financing the litigation, in the absence of any determination that such a power is "necessary to the exercise of all other[]" judicial powers. *Chambers* v. *Nasco, Inc.*, 111 S. Ct. 2123, 2132 (1991) (quoting *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)).

2. Whether a district court may appropriately exercise "inherent power" to impose litigation sanctions upon an entity over whom the court has no *in personam* jurisdiction.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties before the Court of Appeals whose judgment is sought to be reviewed.

In addition to the parties listed in the caption, the following were parties to the underlying district court litigation as plaintiffs: Matthew Lockary, Susan Irland Lockary, Phyllis Gilbert, Charles Gilbert, James Macey, Anton Holter, and Mesa Ranch Limited, a California limited partnership.

Pacific Legal Foundation, the petitioner herein, has no parent or subsidiary companies.

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---

PETITION FOR A WRIT OF CERTIORARI

Pacific Legal Foundation hereby petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., A-1 to A-32) is reported at 974 F.2d 1166 (9th Cir. 1992). The opinion of the United States District Court for the Northern District of California adopting a special master's report imposing sanctions on petitioner (App., B-1 to B-2) is not reported.

JURISDICTION

The court of appeals rendered its judgment on September 9, 1992. Rehearing was denied on December 16, 1992. (App., K-1) This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court's jurisdiction of the underlying action was based on the existence of a federal question (28 U.S.C. § 1331).

CONSTITUTIONAL PROVISION INVOLVED

Article III of the United States Constitution provides in pertinent part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

U.S. Const. art. III, § 2, cl. 1.

STATEMENT

Like several others that this Court has considered in recent years, this case raises significant issues regarding the "inherent power" of Article III courts. The issue here is the lawfulness and propriety of a district court's invoking that power to impose fee-shifting sanctions on a nonprofit charitable corporation that was not a party to the litigation before the district court, and over which the district court never acquired *in personam* jurisdiction.

1. *The Underlying Litigation.* Petitioner Pacific Legal Foundation is a California nonprofit public-interest corporation. As a public interest legal foundation, petitioner sometimes provides attorneys to parties who could not otherwise afford to present their claims in court. It is not a law firm, however, and has no license to practice law.

The *only* action taken by petitioner in this case was to authorize foundation staff attorneys to represent the plaintiffs below in their efforts to protect their property rights. Clerk's Record (hereinafter "CR") 690 at

Exhibit F. Petitioner supplied the lawyers and paid them, but was not itself a party to the case and did not represent the parties.

The defendants below were the Bolinas, California, Community Public Utilities District and current and former directors of the district. The utilities district governs the provision of water in Bolinas. In 1971, the district declared a water emergency and imposed a moratorium on new water hookups. This moratorium has been reenacted from time to time and continues to this day, some two decades after the "emergency" was first declared. CR 112 at 12. Indeed, some of the directors of the district ran for election on the platform of maintaining the moratorium as a means of controlling growth in the community. *Id.* at Attachment A, A(8) and A(42).

The plaintiffs below were individuals and a limited partnership (Mesa Ranch) who owned undeveloped property in Bolinas, California. Because the plaintiffs could not obtain hookups to the local water system, they were denied residential building permits, rendering their property essentially valueless.

Plaintiffs filed their complaint on November 10, 1982, alleging several causes of action including antitrust and equal protection violations and a taking of property without compensation. CR 1. Following several years of litigation, the district court dismissed all of plaintiffs' claims. Plaintiffs later appealed this judgment to the Ninth Circuit and won a reversal on their takings and equal protection claims in *Lockary* v. *Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (App., H-1 to H-5).

2. *The Sanctions Motions.* While the Ninth Circuit appeal was pending, the individual defendants requested sanctions in the district court against the plaintiffs as well as petitioner, but not against any of the individual attorneys for the plaintiffs. CR 498 at 2. Petitioner had not previously appeared in the action. Petitioner filed its first pleadings in the case when it opposed the sanc-

tions motions, arguing, among other things, that the district court lacked *in personam* jurisdiction over petitioner. CR 510 at 1-2; CR 585 at 1-3; CR 648 at 5-6. The district court ignored petitioner's jurisdictional argument and referred the motions to a federal magistrate sitting as special master. CR 543.

Initially, the master proposed to rule that the entire lawsuit was frivolous and had been brought in bad faith. CR 634. In a 119-page draft report (pertinent portions of which are attached as Appendix M), the master argued that none of the causes of action had any merit under the law and that no reasonable attorney could argue otherwise. App., M-6 to M-10. Moreover, the master attributed the sanctionable conduct to petitioner by treating petitioner as plaintiffs' "counsel." *Id.* at M-3. The master therefore proposed to find that petitioner had violated Rule 11 as well as 28 U.S.C. § 1927.

After the master received comments on the draft report, but before he issued a final report, this Court issued its opinion in *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120 (1989). *Pavelic* held that Rule 11 authorizes a court to impose sanctions on an individual attorney who signs a pleading, but does not authorize sanctions against the attorney's law firm. *Id.* at 125-26. This decision forced the master to rethink the legal theory underlying his draft report.

In his Final Report (see App. C), the master reluctantly concluded that the petitioner was beyond the reach of both Rule 11 and 28 U.S.C. § 1927. App., C-4 to C-5. The master went on to rule, however, that petitioner could be sanctioned pursuant to the "inherent power of the court." *Id.* He also continued, without any basis, to treat petitioner as the attorney for the plaintiffs.

The master also withdrew his conclusion that the entire action was completely frivolous and brought in bad faith. Instead, the master proposed to sanction seven specific

instances of litigating conduct. They were: a motion to strike filed by plaintiffs' counsel in early 1983; the assertion of what the master termed a "legally frivolous" procedural due process claim; plaintiffs' change of position on an abstention issue; the alleged "obfuscation" of claims brought by Mesa Ranch limited partnership; an alleged failure to follow an order of the district court to plead with more specificity; the naming of two defendants in the antitrust claims without alleging that they were market participants; and a failure to plead (or prove) that the plaintiffs were market participants. *Id.* at C-104 to C-106.

Without citing any evidence, the master ruled that petitioner was the "sponsor . . . and intended beneficiar[y]" of the offending conduct. *Id.* at C-8. The master further ruled that none of the plaintiffs should be held liable for sanctions. *Id.* at C-43. Ironically, the master also proposed instituting sanctions proceedings against the individual attorneys for plantiffs (App., C-9), but abandoned those proceedings on due process considerations. App. G. The district court adopted the master's report without substantial change. App. B.

During this time, the court of appeals issued the 1990 opinion discussed above (*supra*, p. 3), holding, contrary to the master's view, that the plaintiffs' takings and equal protection claims had merit. 917 F.2d at 1155-57. Petitioner asked both the master and the district court to reconsider their earlier sanctions decisions in light of the court of appeals' ruling, but both declined to do so. Compare CR 690 at 14-18 with App., E-1 to E-105. After further briefing, the master fixed the amount of sanctions at $136,434.50. App., E-105. The district court again adopted the master's report without change. App., D-1 to D-2.

3. *The Sanctions Appeal.* The court of appeals reversed the district court's award of sanctions for the abstention motions and the procedural due process claims. App., A-17, A-19. Sanctions were upheld, however, for the antitrust claims (*id.* at A-23), the alleged failure to

comply with a procedural order (*id.* at A-21), the alleged "obfuscation" of the Mesa Ranch claims (*id.* at A-24), and the filing of the motion to strike (*id.* at A-25). The court of appeals also reversed portions of the district court's order regarding the calculation of the sanctions, but otherwise affirmed. *Id.* at A-26 to A-31.

In so doing, the Ninth Circuit expressly held that the district court possessed "inherent power" to impose sanctions on petitioner. To petitioner's knowledge, no other court of appeals has *ever* upheld the imposition of litigating sanctions upon an entity that is neither a party nor an attorney.

Indeed, the court of appeals began by rejecting the district court's characterization of petitioner as either a law firm or an attorney for plaintiffs. *Id.* at A-11 n.2. Instead, the court of appeals concluded that petitioner could be held liable for sanctions based on the following "facts": that petitioner had contacted and organized the plaintiffs (*id.* at A-6), that the plaintiffs had only nominal interests that were subservient to those of petitioner (*id.* at A-12), that plaintiffs' claims were abandoned after the Ninth Circuit's decision on the merits with the plaintiffs gaining nothing from the litigation (*id.* at A-13), and that the plaintiffs were "pawns or puppets" of petitioner. *Id.*[1] Based on these conclusions,

[1] None of these conclusions has any support in the record. Indeed, the court of appeals' conclusion that petitioner contacted the plaintiffs is contrary to the district court's specific finding that it was the plaintiffs who contacted petitioner, a finding the court of appeals did not reject as clearly erroneous. App., C-15. Petitioner attempted to correct the Ninth Circuit's other mistaken conclusions by filing a motion to augment the record. App. L. Attached to that motion were documents establishing plaintiffs' real and substantial claims (*id.* at L-13 to L-19), setting forth plaintiffs' own protestations that they were not anybody's "pawns" (*id.* at L-5), and documenting the financial settlement plaintiffs received for dismissing their federal claims while preserving their state claims for litigation in state court (*id.* at L-7 to L-11). The court below denied the motion to augment the record and refused to correct its opinion. App. J. Of course, the remainder of this petition assumes *arguendo* the facts "found" by the court of appeals.

the court of appeals ruled that the district court had not abused its discretion by finding that "[petitioner] itself was directly responsible for the sanctioned misconduct" as the "sponsor of this litigation." *Id.* at A-13. Aside from this conclusion, the court of appeals did not address petitioner's objection to the absence of *in personam* jurisdiction.

REASONS FOR GRANTING THE PETITION

This Court has long recognized the existence of certain inherent powers that a court must have in order to function. They include, for example, the power "[t]o fine for contempt—imprison for contumacy—[e]nforce the observance of order, etc." *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). However, any expansion of these powers poses significant risks—to litigants, to our system of federalism, and to the proper balance of powers among the three branches of the federal government. See *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 n.10 (1987) (balance of powers concerns); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (inherent powers shielded from direct democratic controls); *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 941 (1991) (Kennedy, J., dissenting) (raising federalism concerns). Accordingly, this Court has been particularly careful to review lower court holdings that expand the district courts' inherent powers—even when, unlike this case, there is no conflict among the circuits. *E.g.*, *Chambers* v. *Nasco, Inc.*, 111 S. Ct. 2123 (1991) (inherent power to sanction a party to litigation); *Spallone* v. *United States*, 493 U.S. 265 (1990) (contempt sanctions against non-party city council members); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990) (judicially imposed taxes). See also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 230 (1992) (granting certiorari to review 951 F.2d 1128 (9th Cir. 1991), which held that district courts possess inherent power to exclude expert testimony).

This case likewise warrants review, for three independent reasons. First, the Ninth Circuit's unprecedented expansion of the "inherent power" doctrine—to permit the imposition of sanctions on a *non-party* without any finding that such an extraordinary step satisfies the "rule of necessity"—conflicts in several ways with decisions of this Court and with the Fourth Circuit's decision in *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990). Second, the Ninth Circuit's justification for refusing to require *in personam* jurisdiction—*i.e.*, that petitioner was the "sponsor" or "real party in interest" and the plaintiffs were mere "pawns"—conflicts in principle with this Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and the Seventh Circuit's decision in *Panther Pumps & Equipment, Inc.* v. *Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), *cert. denied sub nom. Beck* v. *Morrison Pump Co.*, 435 U.S. 1013 (1978). Third, the decision below warrants this Court's close scrutiny because of its significant impact on the attorney-client relationship, and on public interest litigation generally.

I

This Court has warned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 111 S. Ct. at 2132. To ensure that the lower courts exercise appropriate caution, this Court, various individual Justices, and the courts of appeals have articulated a number of specific limitations on any attempt to expand a federal court's inherent powers.

Three of these are particularly relevant here: First, a district court may not invoke inherent power absent a determination that the exercise of such power is *necessary* to the courts' operation. *Chambers*, 111 S. Ct. at 2132;

Spallone, 493 U.S. at 280; *Young*, 481 U.S. at 801. Second, to ensure adherence to this "rule of necessity," a district court may not invoke its inherent power without first attempting to exhaust whatever powers are available to it under existing statutes or procedural rules. *E.g.*, *Chambers*, 111 S. Ct. at 2141-42 (Kennedy, J., dissenting); *Young*, 481 U.S. at 801. Third, a district court may not invoke inherent authority to make distributional judgments between an attorney who engages in sanctionable conduct and a non-party who is financing the litigation on behalf of a party. *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990).

The Ninth Circuit's decision in this case transgresses each of these limitations. It therefore conflicts with any principled application of the decisions of this Court and the courts of appeals that have articulated those limitations.

1. The very basis for recognizing any inherent powers is that they are necessary to the courts' operation. *Chambers*, 111 S. Ct. at 2132; *Roadway Express, Inc.* v. *Piper*, 447 U.S. at 764; *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34. As this Court stated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911), "the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." This Court has therefore held that inherent powers can be exercised only when *necessary* to preserve the authority of the court (*Roadway Express*, 447 U.S. at 764), and "their assertion requires special justification in each case." (*Chambers*, 111 S. Ct. at 2123 (1991) (Kennedy, J., dissenting) (summarizing prior cases)).

The court of appeals offered no such "special justification" for its unprecedented expansion of inherent authority, and its decision plainly breached the "rule of necessity." The court of appeals never even addressed the question whether invocation of inherent powers to sanction a non-party was "necessary to the exercise of all

other[]" judicial powers, as *Chambers* and other decisions require. Rather than asking that question, the court of appeals simply *assumed* that it was necessary to sanction petitioner. The court then set out to find some authority by which to accomplish that objective. See App., A-8 to A-9. Finding that Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 "were not 'up to the task' of sanctioning" petitioner, the court invoked inherent power. App., A-11.

Had the court of appeals undertaken a "rule of necessity" analysis, it would have had no choice but to conclude that imposing sanctions on a non-party in these circumstances is not "necessary to preserve the authority of the court." As the court recognized, the district courts have authority under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 to impose sanctions upon the *attorneys* who appear before them for abusive litigation tactics. Given that enormous power—a power already expressly granted by Congress—a district court clearly does not need to impose sanctions on an attorney's non-party *employer* in order to protect the court's authority.[2]

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[2] Indeed, this case well illustrates the importance of the rule of necessity in avoiding unnecessary judicial encroachments upon congressional authority. As Justice Kennedy observed in *Chambers*, "the American Rule recognizes that the legislature, not the judiciary, possesses constitutional responsibility for defining sanctions and fees. . . ." *Chambers*, 111 S. Ct. at 2142 (Kennedy, J., dissenting); see *Kaiser Aluminum & Chem. Corp* v. *Bonjorno*, 494 U.S. 827, 835 (1990); *Business Guides Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. at 940 (Kennedy, J., dissenting); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 262 (1975). In the Rule 11 context, moreover, Congress has made the judgment that attorneys should be *personally* liable for sanctionable conduct. See *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120 (1989) (law firm not subject to Rule 11 sanctions for pleadings signed by member of firm). The decision below, therefore, is clearly an intrusion upon this congressional power to allocate the costs of litigation, an intrusion that effectively permits courts to circumvent congressional limitations at will.

Application of the rule of necessity in this case would also have avoided a judicial incursion into matters usually reserved to the

In this case, neither court below found, or indeed could have found, that the imposition of litigation sanctions on a non-party was necessary to protect the district court's authority. This Court should grant certiorari to ensure fidelity to this Court's decisions requiring that any exercise of the district court's inherent power be justified under the "rule of necessity."

2. To ensure compliance with the rule of necessity, this Court's cases generally require district courts to "exercise the least possible power adequate to the end proposed." *Spallone* v. *United States*, 493 U.S. 265, 280 (1990) (internal quotations and citations omitted). Applying this principle in the sanctions context, Justice Kennedy has stated that "the proper exercise of inherent powers requires exhaustion of express sanctioning provisions"—in Fed. R. Civ. P. 11 and 28 U.S.C. § 1927—before invoking inherent power. *Chambers*, 111 S. Ct. at 2141 (Kennedy, J., dissenting). Similarly, Justice Scalia has stated that "[a] court must use the [statutorily] prescribed means unless for some reason they are inadequate." *Id.* at 2141 (Scalia, J., dissenting).

Both courts below utterly failed to "exhaust their statutory remedies." Indeed, the master (acting on behalf of the district court) *began* by invoking inherent power to impose sanctions on petitioner, *then* considered (but ultimately rejected on "due process" grounds) imposing sanc-

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States. In general, state laws permitting recovery for malicious prosecution or abuse of process require proof of malice or improper purpose as a necessary element. See W. Keeton *et al.*, Prosser and Keeton on the Law of Torts §§ 120-21 (5th ed. 1984); 1 F. Harker, F. James & O. Gray, The Law of Torts § 4.8 (2d ed. 1986); Restatement (Second) of Torts § 676 (1977). However, the newly found inherent power of district courts to sanction nonparties creates a new kind of liability, one that is akin to tort liability for malicious prosecution—but with a much lower and undefined standard. See *Business Guides*, 111 S. Ct. at 941 (Kennedy, J., dissenting). For reasons discussed above, there is simply no need to intrude into this area of traditional state authority.

tions on the plaintiffs' attorneys under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. See App., G-1 to G-4. Had the courts below exhausted existing, congressionally authorized remedies before invoking inherent power, the adequacy of those remedies would have been readily apparent.

This Court should grant certiorari to resolve the question whether a district court must make reasonable attempts to exhaust existing statutory authorities before invoking inherent power.

3. By imposing sanctions, not on the attorneys who were before the court, but on their non-party employer, the court of appeals has also placed itself in conflict with the decision of the Fourth Circuit in *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990).

In *Blue*, the district court had imposed sanctions against several individual attorneys, one of whom was employed by the NAACP Legal Defense Fund. The lower court ordered the Legal Defense Fund not to pay any of the sanctions imposed on the attorneys. *Id.* at 549. The Fourth Circuit reversed, ruling that the district court had no power to control the Legal Defense Fund's allocation of its resources. *Id.* In essence, the Fourth Circuit ruled that courts may not make distributional judgments between the attorneys who committed the alleged misconduct and the entity that financed the litigation.

In this case, the district court made the very kind of distributional judgment that the Fourth Circuit held was beyond a district court's inherent power. Rather than sanctioning the *attorneys* who committed the alleged litigating misconduct, the district court required petitioner to bear the financial brunt of its employees' behavior. Under *Blue*, there is little doubt that petitioner would have prevailed before the Fourth Circuit.

This Court should therefore grant the present petition to resolve the conflict between the Fourth and Ninth Cir-

cuits over a district court's authority to make distributional judgments as between attorneys and non-parties who fund their litigation activities.

II

This Court should also grant review to resolve an independent but equally important issue: whether a district court may properly exercise its "inherent power" to impose litigation sanctions upon *any* entity (other than an attorney) over whom the court lacks *in personam* jurisdiction.

1. The district court in this case never acquired *in personam* jurisdiction over petitioner. Petitioner was not named as a party to the litigation and was never served with legal process. See *Federal Trade Comm'n* v. *Compagnie De Saint-Gobain-Pont-A-Mouson*, 636 F.2d 1300, 1318-19 (D.C. Cir. 1980) ("[i]f properly accomplished, service of process confers personal jurisdiction upon a court"); *Gomez* v. *Karavias U.S.A., Inc.*, 401 F. Supp. 104, 107 (S.D.N.Y. 1975) (dismissing London corporation as party where there was no service of process except for service of summons and complaint on U.S. affiliate). Nor did petitioner voluntarily submit itself to the jurisdiction of the court. To the contrary, the *only* reason petitioner ever appeared before the district court was to defend against the sanctions motions, and it consistently asserted in that proceeding (and before the court of appeals) that the court lacked *in personam* jurisdiction. See CR 638 at 2; CR 648 at 5; CR 690 at 2; CR 741 at 1; Appellant's Opening Brief at 12-18, *Pacific Legal Foundation* v. *Paul Kayfetz et al.*, 974 F.2d 1166 (9th Cir. 1992) (No. 91-15384).

The district court sought to escape this difficulty by labeling petitioner as the law firm or "counsel" for the plaintiffs. App. C-1. But the court of appeals rejected this approach and instead characterized petitioner as the "sponsor" of the litigation. App. A-11 n.2, A-12. The court of appeals then proceeded to conclude that the

plaintiffs were mere "pawns" or "puppets" of petitioner. *Id.* at A-13. Thus, although the court of appeals did not forthrightly address the *in personam* jurisdiction issue, the court assumed that the plaintiffs were merely alter egos of petitioner and that the district court could therefore regulate and sanction petitioner's conduct.

That holding is in direct conflict with *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). In *Zenith*, the district court had entered a judgment against a company that was not a party to the litigation, but whose wholly owned subsidiary was a party. During the litigation, the subsidiary had even stipulated that it could be considered the same entity as the parent corporation, and an officer of the parent had appeared as attorney for the subsidiary. *Id.* at 110. Yet this Court ruled that the judgment could not stand against the parent: "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Id.*

Here, as in *Zenith*, the district court never acquired *in personam* jurisdiction over petitioner. Yet the Ninth Circuit has held that the district court could impose financial liability on petitioner on the very theory rejected in *Zenith*, *i.e.*, that petitioner was the plaintiffs' "alter ego."

2. The Ninth Circuit's holding also conflicts with the Seventh Circuit's decision in *Panther Pumps & Equipment Co.* v. *Hydrocraft, Inc.*, 566 F.2d 8, 23 (7th Cir. 1977), *cert. denied sub nom. Beck* v. *Morrison Pump Co.*, 435 U.S. 1013 (1978). There, plaintiff brought an action for civil contempt against an individual, Louis Beck, seeking to enforce an injunction issued in a prior patent infringement suit in which Beck had not been a party. *Id.* at 11-12. After the district court had issued Beck an order to show cause why he should not be held in contempt, plaintiff moved to substitute Beck *and* Universal Spray Systems, Inc., a corporation wholly owned by Beck,

as defendants in the original suit. *Id.* at 12. The district court denied this request.

On appeal, the Seventh Circuit held that Beck could be substituted, but that the motion to substitute Universal faced "an insurmountable obstacle: lack of personal jurisdiction." *Id.* at 23. It held that because "[t]he district court's order to show cause was directed *only* to Beck[,] it did not bring Universal before the lower court." *Id.* Relying upon *Zenith*, the Seventh Circuit held that "[a]lthough we have held . . . that Universal is merely Beck's *alter ego*, that fact cannot alone confer personal jurisdiction over Universal." *Id.*

Had the Ninth Circuit followed the Seventh Circuit's analysis in *Panther Pumps*, it would have held that the absence of *in personam* jurisdiction is an "insurmountable obstacle" to the sanctions award against petitioner. See also *Gomez* v. *Karavias U.S.A.*, 401 F. Supp. at 107 (dismissing London corporation as a party where there was no service of process except by service of summons and complaint on U.S. affiliate). This Court should therefore grant review to resolve the conflict between the Ninth and Seventh Circuits over the power of a district court to impose liability upon an entity over which the court has no *in personam* jurisdiction, and to ensure the lower courts' continued fidelity to *Zenith*.

III

Finally, the Ninth Circuit's dramatic expansion of the inherent powers doctrine warrants this Court's review because of its practical implications for virtually all public-interest organizations, their employees, and the individuals those organizations seek to serve. Obviously, the court of appeals' decision stands as precedent for imposing fee-shifting sanctions on *any* organization that provides counsel for third parties engaged in litigation. The potential financial liability to such organizations

could be enormous, as illustrated by the fee award in this case—$136,434.50 before any reductions occasioned by the court of appeals' decision.

As a matter of public policy, this newly created financial liability is significant, not so much for its direct effect upon public-interest organizations (though that is obviously important), but primarily because of two indirect effects: (1) the impact of this potential liability on the attorney-client relationship in litigation funded by such organizations, and (2) the effect of such liability on the ability and willingness of those organizations to fund public-interest litigation.

1. *Attorney-Client Relationship.* It has long been recognized that "[a]n attorney acts not only as a client's representative, but also as an officer of the court, and has a duty to serve both masters." *Business Guides*, 111 S. Ct. at 940 (Kennedy, J., dissenting); see also *Georgia* v. *McCollum*, 112 S. Ct. 2348, 2361-62 (1992) (discussing attorney's two duties); *McCoy* v. *Court of Appeals*, 486 U.S. 429, 447 (1988) (noting delicate balance struck between duty to client and duty to court owed by appointed counsel for indigents); *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981) (holding that by serving the court, appointed counsel does not become state actor). Most experienced attorneys have vivid and painful memories of situations in which those twin duties came into conflict.

The Ninth Circuit's decision, however, significantly complicates the already complicated three-way relationship among the attorney, the court and the client. Because any non-party organization financing litigation may now be sanctioned based on what occurs in the courtroom, such an organization now has an enormous incentive—if not a fiduciary obligation to its members—to take an active, direct role in the conduct of the litigation. Interference with the attorney-client relationship is almost unavoidable.

Indeed, by imposing liability for attorney behavior on the organizations funding the litigation, the courts below seem to be asking those outsiders to perform a traditional *judicial* function: policing the practice of law. See, *e.g.*, *Pavelic*, 493 U.S. at 126; *Roadway Express, Inc.* v. *Piper*, 447 U.S. at 766.

Ethical rules, however, generally prohibit just this kind of interference by anyone other than a judge. In California, for example, Rule 1-600 of California's Rules of Professional Conduct specifically prohibits interference with the attorney's professional judgment or independence. The rule also prohibits *participation* in an organization furnishing legal services if the organization interferes with the attorney-client relationship.

Thus, the Ninth Circuit's decision places attorneys and public interest organizations alike on the horns of a dilemma: Financial (and perhaps fiduciary) considerations *require* the public-interest organization to second-guess the attorney's professional judgments and thereby interfere with the attorney-client relationship. But ethical considerations require the attorney (who is often an employee of the organization) to spurn any such interference, and, in California at least, to resign from any organization that engages in such interference. Thus, the decision below not only places both the attorney and the organization in an impossible situation, but also disserves the client's interests.

The dilemma is exacerbated by the *extent* of supervision that would be required to avoid liability under the Ninth Circuit's decision. The sanctions it upheld were *not* imposed for such broad, strategic decisions as which theories of liability to press in a complaint or on appeal. Rather, as discussed above (*supra*, at 5-6), the court of appeals upheld sanctions for such alleged deficiencies as a failure to plead or prove that the plaintiffs and some of the defendants were "market participants," a failure to plead other claims with sufficient clarity or detail, and the filing of an ill-founded motion to strike. Obviously, peti-

tioner would have had to micro-manage the entire litigation to avoid liability.

2. *Public-Interest Litigation.* Besides undermining the attorney-client relationship, the dilemma created by the decision below will undoubtedly discourage a great deal of public interest litigation.

In the First Amendment context and elsewhere, this Court has long recognized the significant contribution public-interest organizations have made to the development of the law and to the public good. *E.g.*, *NAACP* v. *Button*, 371 U.S. 415, 431 (1962); *In re Primus*, 436 U.S. 412, 428 (1978). Indeed, absent financial and logistic support by such organizations, the cases leading to many of this Court's landmark rulings might never have been brought. *E.g.*, *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Swann* v. *Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1 (1971); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987).

The decision below will undoubtedly discourage such litigation in two ways. First, the mere prospect of financial liability will deter public interest organizations from supporting litigtation at all. Second, even when the *organization* decides to assist the parties in a particuar case, the pervasive interference in the attorney-client relationship required by the decision below will discourage competent attorneys from working on those cases.

What is most tragic about this state of affairs is that there is no good reason for such interference. As discussed above (*supra*, p. 10), a court can control its proceedings much more efficiently through its control over the litigants and attorneys actually appearing before it than through any control it might achieve over a nonparty organization that supports the litigation.

In sum, the decision below raises issues of overriding importance to courts, litigants, and the many organizations that fund public-interest litigation. This Court should grant review to ensure that the Ninth Circuit's decision receives the careful scrutiny it deserves.

CONCLUSION

For these reasons, petitioner urges this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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